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Appellate Courts Case Information

Supreme Court

Court data last updated: 02/09/2021 10:31 AM

Disposition

COLONE v. S.C. (GITHUB)

Division SF

Case Number S265307

Only the following dispositions are displayed below:
Orders Denying Petitions, Orders Granting Rehearing
and Opinions. Go to the Docket Entries screen for in-
formation regarding orders granting review.

Case Citation:

none

Date Description

01/13/2021 Petition for review denied

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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

JOSEPH COLONE,

Petitioner,

v.

SUPERIOR COURT FOR
THE CITY AND COUNTY
OF SAN FRANCISCO,

Respondent;

GITHUB, INC.,

Real Party in Interest.

A160989

(San Francisco
County Super. Ct.
No. CPF20517083)

(Filed Oct. 21, 2020)

BY THE COURT:

The petition for writ of mandate or other appropriate relief is denied. (18 U.S.C. § 2702(a); see *O’Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1447 [“Since the [Stored Communications] Act makes no exception for civil discovery and no repugnancy has been shown between a denial of such discovery and congressional intent or purpose, the Act must be applied, in accordance with its plain terms, to render unenforceable the subpoenas seeking to compel [electronic communications service providers] to disclose the contents of emails stored on their facilities.”]; *Facebook, Inc. v.*

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Wint (D.C. 2019) 199 A.3d 625, 628-629 [collecting unanimous case authorities holding that Stored Communications Act prohibits disclosure of the contents of covered communications in response to criminal defendants' subpoenas]; see also *Facebook, Inc. v. Superior Court (Hunter)* (2018) 4 Cal.5th 1245, 1271 ["Congress intended section 2702 to prohibit disclosure by providers of . . . private or restricted . . . social media communications."].)

The applications of Megan A. Crowley and Alexander E. Berengaut for admission pro hac vice are granted. (Cal. Rules of Court, rule 9.40(a), (d).)

Date: 10/21/2020 /s/ Humes, P. J. P.J.
PRESIDING JUSTICE

Before: Humes, P.J., Banke, J., and Sanchez, J.

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**SUPERIOR COURT FOR
THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO**

IN RE APPLICATION OF:
JOSEPH COLONE

Case No. CPF-20 517083

**~~{PROPOSED}~~ ORDER
DENYING PETITIONER
JOSEPH COLONE'S
AMENDED NOTICE OF
MOTION AND MOTION TO
COMPEL PRODUCTION
OF RECORDS PURSUANT
TO CAL. PENAL CODE
1334.2**

Hearing Date: July 28, 2020

Hearing Time: 9:00 a.m.

Department: 302

Action Filed: May 1, 2020

(Filed Jul. 28, 2020)

Applicant Joseph Colone's amended motion to compel production of records pursuant to California

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Penal Code § 1334.2 is denied. Assuming arguendo that section 1334.2 applies, the subpoena Colone served on Respondent Github, Inc. is prohibited by the Stored Communications Act, and therefore must be quashed. The SCA provides that, subject to certain conditions and exceptions, “a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service.” (18 U.S.C. § 2702(a)(1).) Similarly, subject to certain additional conditions, “a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service.” (18 U.S.C. § 2702(a)(2).) Colone does not contest that Github is both an electronic communication service and a provider of remote computing service, and that the ESR source code and other materials it seeks to compel constitute communications in electronic storage. Colone makes no attempt to show that the compelled disclosure it seeks falls within any enumerated statutory exception to the SCA. (See 18 U.S.C. § 2702(b).) Accordingly, under controlling California authority that Colone fails squarely to address, “the Act must be applied, in accordance with its plain terms, to render unenforceable the subpoena” seeking to compel Github to disclose the source code and other materials stored on its facilities. (*O’Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1447; see also *Facebook, Inc. v. Wint* (D.C.Ct.App. 2019) 199 A.3d 625, 629 [“every court to consider the issue has concluded that the SCA’s general

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prohibition on disclosure of the contents of covered communications applies to criminal defendants' subpoenas"] [collecting authorities].) If Colone wishes to review the source code, he may do so by entering into the non-disclosure agreement required by ESR.

DATED: July 28, 2020

/s/ Ethan P. Schulman
The Honorable
Judge Ethan P. Schulman
